Supreme Court, U.S.
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No. ——

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1997

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CARPENTERS LOCAL 209,
*Petitioner,*

v.

ANHEUSER-BUSCH, INC.,
*Respondent.*

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**Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Do the Norris-LaGuardia Act, 29 U.S.C. § 101 et seq., and the First Amendment prior restraint doctrine preclude preliminary relief, issued before any trial on the merits of plaintiff's claims or any final determination of the legal validity of those claims, broadly enjoining on the basis of its content peaceful speech publicizing a labor dispute?

2. On the independent review of the record mandated by this Court for cases implicating free speech interests, particularly during a labor dispute, does the record support the conclusion that the Union's banner, which was literally true according to the dictionary definitions of the words used, was nonetheless so misleading as to be false and unprotected by the First Amendment?

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| TABLE OF AUTHORITIES | iv |
| PETITION FOR WRIT OF CERTIORARI | 1 |
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED | 2 |
| STATEMENT OF THE CASE | 2 |
| REASONS FOR GRANTING THE WRIT | 10 |
| I. The Norris-LaGuardia Act and the First Amendment Prior Restraint Doctrine Preclude Preliminary Injunctions Against Peaceful But Allegedly False Labor Speech | 14 |
| A. The Norris-LaGuardia Act | 14 |
| B. First Amendment Prior Restraint Doctrine | 21 |
| II. This Court Should Grant Certiorari and Exercise Its Independent Judicial Judgment to Conclude that the Union's Banner Is Fully Protected by the First Amendment | 24 |
| CONCLUSION | 28 |

## TABLE OF AUTHORITIES

CASES — Page

*Alexander v. United States*, 509 U.S. 544 (1993) .. 21, 23
*Bose Corp. v. Consumer Union*, 466 U.S. 505 (1984) ..... 12, 24
*Burlington No. R. Co. v. Bhd. of Maintenance of Way Employees*, 481 U.S. 429 (1987) ..... 11, 15
*Cafeteria Employees Local 302 v. Angelos*, 320 U.S. 293 (1943) ..... 26
*DeBartolo Corp. v. Fla. Gulf Coast Building & Construction Trades Council*, 485 U.S. 568 (1988) .. 18
*In re District No. 1—Pacific Coast District Marine Eng'rs' Beneficial Ass'n*, 723 F.2d 70 (D.C. Cir. 1983) ..... 16
*District 17, United Mine Workers of America v. A&M Trucking, Inc.*, 991 F.2d 108 (4th Cir. 1993) ..... 16
*Drywall Tapers and Pointers v. Operative Plasterers' and Cement Masons' Int'l Association*, 537 F.2d 669 (2d Cir. 1976), *cert. denied*, 444 U.S. 1073 (1980) ..... 16
*Eccles v. Peoples Bank of Lakewood Village, Cal.*, 333 U.S. 426 (1948) ..... 15
*Fort Wayne Books v. Indiana*, 489 U.S. 46 (1989) .. 12, 23
*Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) .. 21
*Hoh v. Pepsico, Inc.*, 491 F.2d 556 (2d Cir. 1974) .. 16
*Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) .... 10
*International Association of Machinists v. Winship Green Nursing Center*, 103 F.3d 196 (1st Cir. 1996) ..... 17
*International Union UAW v. LaSalle Machine Tool*, 696 F.2d 452 (6th Cir. 1982) ..... 16
*Ironworkers v. Pauly Jail Building Co.*, 118 F.2d 615 (8th Cir. 1941), *cert. denied*, 314 U.S. 639 (1941) ..... 20
*Jacksonville Bulk Terminals v. Longshoremen*, 457 U.S. 702 (1982) ..... 14
*Jacobellis v. Ohio*, 378 U.S. 184 (1964) ..... 12
*Kramer v. Thompson*, 947 F.2d 666 (3d Cir. 1991) .. 23
*Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85 (1977) ..... 22

TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| *Linn v. United Plant Guard Workers of America*, 383 U.S. 53 (1966) | 8, 22 |
| *Machinists v. Street*, 367 U.S. 740 (1961) | 11 |
| *Marine Cooks & Stewards v. Panama S.S. Co.*, 362 U.S. 365 (1960) | 15 |
| *Marriott Corp. v. Great America Service Trades Council*, 552 F.2d 176 (7th Cir. 1977) | 20 |
| *Mercy Health Services v. Local 1199 National Health and Human Service Employees Union*, 888 F. Supp. 828 (1995) | 13 |
| *Molko v. Holy Spirit Association*, 46 Cal. 3d 1092 (1988) | 7 |
| *Near v. Minnesota*, 283 U.S. 697 (1931) | 12, 14, 22 |
| *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976) | 12, 21 |
| *New York Times v. Sullivan*, 376 U.S. 254 (1964) | 22 |
| *Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin*, 418 U.S. 264 (1984) | *passim* |
| *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) | *passim* |
| *Pittsburgh Press v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973) | 22, 23 |
| *San Antonio Community Hospital v. Southern California District Council of Carpenters*, 115 F.3d 685 (9th Cir. 1997) | 3, 4 |
| *Southeastern Promotions, Ltd. v. Conrad*, 357 U.S. 513 (1975) | 22 |
| *Tejidos De Coamo, Inc. v. ILGWU*, 22 F.3d 8 (1st Cir. 1994) | 16 |
| *Thornhill v. Alabama*, 310 U.S. 88 (1940) | 18, 25 |
| *United Telegraph Workers v. Western Union*, 771 F.2d 699 (3rd Cir. 1985) | 16 |
| *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308 (1980) | 12, 23 |
| *WHS Entertainment Ventures v. United Paperworkers International Union*, 1998 WL 119606 (M.D. Tenn. Mar. 11, 1998) | 17 |
| *Wilson & Co. v. Birl*, 105 F.2d 948 (3rd Cir. 1939) | 20 |

TABLE OF AUTHORITIES—Continued


| STATUTES | Page |
|---|---|
| 15 U.S.C. § 1114(a) | 7 |
| 15 U.S.C. § 1125 | *passim* |
| 15 U.S.C. § 1125(c) | 7, 17, 18 |
| 15 U.S.C. § 1125(c)(4) | 7 |
| 15 U.S.C. § 1127 | 7, 17 |
| 28 U.S.C. § 1254(1) | 2 |
| 29 U.S.C. § 101 *et seq.* | 5 |
| 29 U.S.C. § 104 | 19 |
| 29 U.S.C. § 104(e) | 6, 20 |
| 29 U.S.C. § 107 | 15 |
| 29 U.S.C. § 107(a) | *passim* |
| 29 U.S.C. § 107(c) | 6, 19 |
| **LEGISLATIVE HISTORY** | |
| 141 Cong. Rec. S19310 (daily ed. Dec. 29, 1995) | 18 |
| H.R. Rep. No. 104-374 (1995) | 18 |
| **MISCELLANEOUS** | |
| Ballantine's Law Dictionary, 1055 (3d ed. 1969) | 11 |
| Cola, *Senate Office of Research, Internal Government Review Agencies*, 15-SUM Cal. Reg. L. Rep. 28 (1995) | 27 |
| Consol, *Stock Answers and the Minimum Wage*, The San Francisco Business Times, Friday, July 19, 1996 | 27 |
| Frankfuter & Green, *The Labor Injunction* (1930) | 14, 20 |
| Jerry, *Health Insurance Coverage for High-Cost Health Care: Reflections on the Rainmaker*, 26 U. Mem. L. Rev. 1347; 1354 (1996) | 27 |
| J. Thomas McCarthy, Mccarthy on Trademarks and Unfair Competition | 18 |
| Miller & Collins, *Growing Economic Fairness*, 26 Social Policy 41 (June 1, 1996) | 27 |
| The Oxford English Dictionary 205 (2d ed. 1989) | 10 |
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| George A. Tracy, *History of The Typographical Union No. 56* (1913) | 11 |
| Webster's Third New International Dictionary 1884 (unabridged ed. 1986) | 10 |

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## PETITION FOR WRIT OF CERTIORARI

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Petitioner Carpenters Local 209, the defendant in the district court and the appellant in the court of appeals, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in *Anheuser-Busch, Inc. v. Carpenters Local 209*, 9th Cir. No. 97-56305, entered on February 27, 1998.

## OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals for the Ninth Circuit, issued on February 27, 1998, is not reported. It appears in Appendix B hereto, at pp. 3a-4a. The opinion of the United States District Court for the Central District of California, issued on September 17, 1997, is unreported and is printed in Appendix C, at pp.

5a-11a. The District Court's temporary restraining order, issued on September 10, 1997, is also unreported and appears in Appendix D, at pp. 12a-13a.

The divided panel decision of the Ninth Circuit in a related case, *San Antonio Community Hospital v. Southern California District Council of Carpenters*, 125 F.3d 1230 (9th Cir. 1997), dispositively relied upon by both the district court and the Ninth Circuit in this case, issued on September 8, 1997, is reprinted in Appendix E, at pp. 14a-32a. A divided Ninth Circuit decision denying the suggestion for rehearing en banc in *San Antonio Community Hospital*, filed on February 17, 1998, is reported at 137 F.3d 1090 (9th Cir. 1998) and is reprinted in Appendix F, at pp. 33a-42a.

## JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Ninth Circuit was entered on February 27, 1998. On May 20, 1998, Justice O'Connor extended the time within which to file the petition for writ of certiorari to June 27, 1998. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are set forth in Appendix G to this Petition, at pp. 43a-46a.

## STATEMENT OF THE CASE

1. *Facts*: Petitioner Carpenters Local 209 ("the Union") is embroiled in a labor dispute with Respondent, Anheuser-Busch, Inc., ("the Company" or "Budweiser") and one of its contractors, H.M.S., Inc. That dispute stems from Budweiser's replacement of a union contractor performing construction work at one of its breweries. The union contractor's collective bargaining agree-

ment met state-determined prevailing wage and benefit standards. H.M.S. did not meet those area labor standards. App. 6a.

To publicize its dispute, the Union, beginning on August 5, 1997, posted banners in front of the brewery at which H.M.S. was performing construction work.[1] The banners were worded in such a way as to attract attention to, and dramatically underscore, the Union's disagreement with the Company's use of nonprevailing wage contractors. The two 20 x 5 foot stationary banners stated: in 12-inch, red letters "*Budweiser* HAS RATS"; in 6-inch, black letters "IN THEIR BREWERY"; and in 5-inch letters "LOCAL #209 LABOR DISPUTE WITH RAT CONTRACTOR H.M.S." with the words "Local #209 labor dispute with" in black letters and the words "rat contractor H.M.S." in red letters. App. 1a. There was no violence, confrontational conduct or patrolling associated with the stationary banner displays.

The Union used the word "rats" on its banners in a well-established sense, customary in labor disputes for more than a century. Numerous dictionaries define the word "rat" as an employer who is not paying its workers the prevailing wage, as well as employees working for less than the prevailing wage. App. 29a.

The Union's activities took place against the background provided by the Ninth Circuit's first opinion—later substantially revised—in *San Antonio Community Hospital v. Southern California District Council of Carpenters*, 115 F.3d 685 (9th Cir., June 4, 1997). *San Antonio* upheld an injunction against a banner that used the term "rat" in that same sense as the banners in this case—to communicate with the public concerning the Union's dispute with

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[1] For two days—July 23, and July 24, 1997—the Union picketed the brewery. On the second day, Anheuser-Busch obtained a state court injunction restraining certain picketing activities allegedly in violation of state law. All picketing stopped on that day.

an employer.[2] The *San Antonio* opinion stressed that the banner in that case "[did] not identify Best Interiors as the 'rat contractor' "; contained explanatory language only in a hard-to-read location on the banner near the feet of the individuals holding it; and identified the contractor only in two-inch handwritten letters that were "as a result, difficult to read at best by drivers passing by." 115 F.2d at 690.

In this instance, therefore, the Union used banners twice as long and a foot taller than those in *San Antonio Community Hospital*; clearly identified H.M.S. as the "rat contractor," thereby indicating the sense in which the term was used on the banner; and used much larger letters than in *San Antonio*, printed rather than handwritten, for the name of the contractor.

2. *Proceedings*: On August 6, 1997, Respondent sought an injunction in state court against display of the banners on the ground that the banners were fraudulent. The Los Angeles Superior Court, however, found that "the word 'rats' is subject to two meanings, one of which is a crude reference to the brewery mangement, agents, etc. in this hotly contested labor dispute." Ninth Circuit Excerpts of Record (ER) 8, pp. 1-2. The state court concluded to "enjoin such free speech would be inappropriate under the circumstances." *Id.*

Almost a month later, on September 4, 1997, Respondent filed an *Ex Parte* Application for a Temporary Restraining Order (TRO) in federal district court, alleging claims of trademark infringement and trademark dilution under the Lanham Act, 15 U.S.C. § 1125, and a common

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[2] The banner in *San Antonio Community Hospital* publicized a dispute with a hospital concerning its hiring of a nonprevailing wage contractor. It read "This Medical Facility is Full of Rats. Carpenters L. U. 1506 has a dispute with Best Interiors for failing to Pay Prevailing Wages to Its Workers." After the injunction issued, the union in that case added a second banner stating "Best Interiors is the Rat Contractor," and the district court held the two banners together permissible under the injunction.

law claim for fraud. App. 6a. The Union promptly submitted pleadings contending that no injunction could issue under the Norris-LaGuardia Act (NLA), 29 U.S.C. §§ 101-115.

The district court, however, refused to consider, before issuing the TRO, the Norris-LaGuardia Act jurisdictional prerequisites for granting any injunction in a labor dispute. Placing dispositive reliance on the Ninth Circuit's decision in *San Antonio Community Hospital* (refiled in its revised form on September 8, 1997), the district court, within six days of Anheuser-Busch's filing, issued a TRO. That restraining order enjoined the Union from:

> using [Respondent's] registered "Budweiser" trademark in an advertisement or sign exhibited to the public, disparaging the purity of [Respondent's] product, and expressly or impliedly representing by word, sign, or action, the false notion that the Van Nuys facility has a rodent or any other loathsome problem [or] . . . using the term 'Rats' as they currently have in their banner display in front of [Respondent's] facility. [App. 13a.]

At the hearing on a preliminary injunction five days later, on September 15, 1997, the district court began by stating: "Gentlemen, this proceeding is going to be short and sweet. I don't need to hear any evidence on the case. I'm convinced the injunction should issue." ER 18, p.3.[3] The Union had, in its papers, raised once again the NLA procedural requirements as a bar to injunctive relief, including particularly the provision that: "No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or

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[3] The parties had, at the court's request, submitted summaries of proposed testimony that they were prepared to offer through live witnesses. The proposed testimony was not, however, submitted under oath; was not, or course, subject to cross-examination; and did not give the opposing party an opportunity to present rebuttal testimony. And there had, of course, been no opportunity for discovery in the short time since the case was filed.

growing out of a labor dispute . . . except after hearing the testimony of witnesses in open court (with opportunity for cross-examination)". (29 U.S.C. § 107(a)). Nevertheless, when the Union invoked the Norris-LaGuardia Act's jurisdictional provisions at the hearing, the judge reiterated that "I don't need witnesses to convince me," ER 18, p. 6, and refused to hear any testimony whatsoever.

Two days later, the district court issued an order granting a preliminary injunction identical to the TRO. App. 11a. The court did not find that the banners were illegible, in whole or part, to passersby, nor did the district court note the differences between the banner in *San Antonio Community Hospital* and the banners in this case. Rather, the court simply concluded that because the Company had no rodents in its facility, the Union was not "advertising facts," but was "advertising falsehoods and their methods involve fraud." App. 7a. And on that basis the district court determined, following *San Antonio*, that the provision of the Norris-LaGuardia Act prohibiting the issuance of an injunction against "[g]iving publicity to the existence of, or the facts involved in, any labor dispute . . . by any method not involving fraud or violence," (29 U.S.C. § 104(e)) did not preclude injunctive relief.

The district court did not address the First Amendment issues raised by the Union as precluding any injunction. As to the required NLA finding "[t]hat as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief," (29 U.S.C. § 107(c)), the district court gave no weight whatever to the Union's interest in expressing its message concerning the labor dispute in the terms that it chooses, so as to convey its position on the subject to the public in a manner likely to be noticed and read. Rather, the court viewed the sole injury to the Union as the "slight inconvenience and insubstantial economic cost of produc[ing] Defendant's existing banners and replacement banners." App. 8a.

Finally, although the NLA requires a finding that the Union's actual or threatened actions *are* "unlawful" (29 U.S.C. § 107(a)), the district court found only "*probable* success on the merits of the claim for fraud and dilution," (App. 10a, emphasis supplied), and addressed the legal issues in a perfunctory manner. The court made no findings on the elements of common law fraud (and the Company conceded on appeal that its allegations would not establish an action for common law fraud (Answering Brief of Appellee Anheuser-Busch, Inc., at 39)).[4]

On the Lanham Act causes of action, the district court held that the Company had not made out a claim under 15 U.S.C. § 1114(a), because there was no showing of a likelihood of confusion. On the claim under 15 U.S.C. § 1125(c), however, providing for "an injunction against another person's commercial use in commerce of a mark or trade name," the court found a likelihood of injury to business reputation. The court did *not*, though, address the critical question whether the Union's use of Budweiser's tradename on its banners only in the course of commenting on the Company's actions—a use of a company name that is nearly inevitable in any protest seeking to bring to the attention of the public actions by a company of which the speaker disapproves, in order to persuade the public to the speaker's disapproving view—was a "commercial use in commerce," as defined under the statute. *See* 15 U.S.C. § 1127 (defining "use in commerce" as use to further the sale or advertising of goods or services.); 15 U.S.C. § 1125(c)(4) (§ 1125(c) does not apply to "[n]oncommercial use of a mark.").

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[4] In particular, there was no allegation or proof, nor could there be, that the Company, the only plaintiff, relied upon the Union's supposed representations concerning rodents. *See, e.g., Molko v. Holy Spirit Assn.*, 46 Cal. 3d 1092, 1108 (1988) (justifiable reliance to the plaintiff's detriment is an element of common law fraud). Obviously, the Company was in a much better position than the Union to know whether or not there were rodents in the Budweiser plant.

On September 24, 1997, the Union timely filed a notice of appeal of the "Budweiser" preliminary injunction. While that appeal was pending, the Ninth Circuit, on February 17, 1998, over the strong dissent of four judges, denied a petition for rehearing and suggestion for rehearing en banc in *San Antonio Community Hospital.*

Ten days later, on February 27, 1998, a Ninth Circuit panel, without holding oral argument, issued a three paragraph *per curiam* opinion in this case summarily upholding the issuance of the "Budweiser" injunction. The Ninth Circuit ruled simply that the district court "did not rely on an erroneous legal premise or abuse its discretion in concluding that appellee's showing of probable success on the merits and the possibility of irreparable injury was sufficient," citing *San Antonio Community Hospital*; and that, because "the court's factual findings regarding appellant's display of the controversial banner are not clearly erroneous," the case comes within the fraud exception to the Norris-LaGuardia Act prohibition on enjoining speech during a labor dispute, again citing *San Antonio.* App. 3a-4a.[5]

3. *The San Antonio Community Hospital Case*: To fully understand the background of this case, some further attention to the Ninth Circuit's decision in *San Antonio* is helpful.

In *San Antonio,* a divided panel recognized that "the term 'rat' " has "deep historical meaning in the context of labor disputes," included in most dictionaries' entries on the word "rat". App. 22a. And the Ninth Circuit recognized as well that under this Court's decisions in *Linn v. United Plant Guard Workers of Am.*, 383 U.S. 53 (1966) and *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin,* 418 U.S. 264, 283

[5] The Ninth Circuit did not mention various NLA procedural issues raised by the Union, although those issues were extensively briefed to the court of appeals.

(1984), the federal labor laws "give[] a union license to use intemperate, abusive, or insulting language without fear of restraint or penalty if it believes such rhetoric to be an ineffective means to make its point," (*Letter Carriers*, 418 U.S. at 283). App. 21a. Nonetheless, the Ninth Circuit concluded that the injunction was proper under both the Norris-LaGuardia Act and the First Amendment, because "the language on the Union's banner crossed the line separating protected rhetorical hyperbole from unprotected fraudulent misrepresentations of fact." App. 25a.

Judge Kozinski dissented, stressing that "[t]hose who would enjoin speech concerning a matter of public interest must bear a heavy burden . . . more so if the speech in question concerns a labor dispute," and that there was no proof on the record in that case—as there certainly is not in the Budweiser case at hand, since there is no record to speak of—"that a single person was actually deterred by the sign" from trading with the employer. App. 30a. And Judge Kozinski went on to highlight the unprecedented nature of the Ninth Circuit's decision:

> Not only is this the first case to affrm a labor injunction, it is the first case ever (so far as I am aware) to uphold a preliminary injunction against speech covered by [*New York Times v. Sullivan*, 376 U.S. 254 (1964)]. Because *Sullivan* speech always involves matters of public interest, I had assumed that damages after trial on the merits is the high water mark of available relief. [App. 31a-32a.].

Five months after the revised opinion issued in *San Antonio*, the Ninth Circuit denied the suggestion for rehearing en banc, with four judges recording their dissent from the denial. The dissent concluded that enjoining the banner could not be squared with either the Norris-LaGuardia Act or the First Amendment:

> [I]n passing the Norris-LaGuardia Act, 'Congress was intent on taking the federal courts out of the

> labor injunction business.' *Marine Cooks & Stewards v. Panama S.S. Co.*, 362 U.S. 365, 369 (1960). . . . [T]his court's . . . unfortunate and unprecedented decision . . . get[s] back into that business in order to regulate traditional, robust labor speech, in violation of the clear mandate of not only our national labor laws but of our fundamental First Amendment doctrine as embodied in *New York Times v. Sullivan.* [App. 42a (Reinhardt, J., dissenting).]

## REASONS FOR GRANTING THE WRIT

In *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), this Court described the advertisements for Campari Liquor, a parody of which was at the center of that intentional infliction of emotional distress case, as follows:

> [T]he ads . . . included interviews with various celebrities about their "first times." Although it was apparent by the end of each interview that this meant the first time they sampled Campari, the ads clearly played on the sexual double entendre of the general subject of "first times." [485 U.S. at 48.]

The banners in this case, and in the *San Antonio Community Hospital* case, its predecessor in the Ninth Circuit, used the same familiar technique of beginning a message with a double entendre—a word with two meanings—to attract attention to a message. The remainder of the message in this case used the term "rat" in an accepted, albeit metaphorical, sense, to communicate in a short-hand fashion both the reason for the Union's dispute with the Company and the depth of the Union's feeling regarding that dispute.[6]

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[6] One of the generally accepted definitions of the term "rat" is "[a] workman who refuses to strike along with others, or takes a striker's place; also (esp. among printers), one who works for lower wages than ordinary (or trade-union) rate." 13 The Oxford English Dictionary 205 (2d ed. 1989) (emphasis added). *See also*, Webster's Third New International Dictionary 1884 (unabridged ed. 1986) (defines "rat" as: "(1): a printer who works for less than the established or prevailing rate of pay (2): a scab,");

Whether the Union's overall message, despite its literal truth and use of a common rhetorical device for attracting attention to one's message, was so false or misleading as to come within the "fraud" exception to § 4(e) of the Norris-LaGuardia Act and fall beyond the First Amendment's protection of freedom of speech remains at this juncture a matter of dispute in this case. For, there has been no trial on the question, and therefore no final decision.

The district court here nonetheless enjoined the Union's use of its banner, and imposed other, more general restraints on the Union's speech concerning its labor dispute with Anheuser-Busch. And the district court did so, as we show below, in direct contravention, both of (1) the explicit terms of the Norris-LaGuardia Act, enacted as an "extraordinary step . . . to remedy an extraordinary problem" . . . the pattern of injunctions entered by federal judges" (*Burlington No. R. Co. v. Bhd. of Maintenance of Way Employes*, 481 U.S. 429, 437-38 (1987)), by " 'express[ing] a basic policy against the injunction of activities of labor unions' " (*id.* at 437, *quoting Machinists v. Street*, 367 U.S. 740, 772 (1961)); and (2) this Court's First Amendment prior restraint cases, precluding injunctions prohibiting speech in advance of its utterance,

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Ballantine's Law Dictionary, at 1055 (3d ed. 1969) (defining the term "rat" in a labor union context as a "scab.")

This usage of the term "rat" is a venerable one. As early as 1816, the Albany printers society used "the odious appellation of 'rat' " to refer to "a workman who accepted wages lower than the rate." George A. Stevens, *New York Typographical Union No. 6* 50, n.3 (1913). *See also id.*, at 143 (describing the "preparation and distribution of 'rat' circulars" in New York City as early as 1831); George A. Tracy, *History of The Typographical Union No. 56* 118 (1913) ("Keeping a registry of the names of 'rats' and other unworthy members of the trade, and description of their persons, to be sent to every union or society in the country and to be kept by each union for reference."); 13 The Oxford English Dictionary 205 (2d ed. 1989) (dating use of term "rat" in above context to 1824).

and, where it is claimed that particular speech is outside the First Amendment's protections, proscribing any injunctions curbing that speech in advance of a final determination that that speech is in truth unprotected. (*Near v. Minnesota*, 283 U.S. 697, 713-14 (1931); *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308 (1980) (*per curiam*); *Fort Wayne Books v. Indiana*, 489 U.S. 46, 63-64 (1989)).

The Ninth Circuit, moreover, rather than correcting the district court's manifest errors, treated the district court's rulings deferentially, as if the case involved an ordinary preliminary injunction and not a prior restraint on speech. The court of appeals thereby failed entirely to perform the "special responsibility on judges whenever it is claimed that a particular communication is unprotected" to make "an independent examination of the allegedly unprotected material [so as] to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." *Bose Corp. v. Consumer Union*, 466 U.S. 505, 507-08 (1984); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 562 (1976).

What this case is about, then, is whether the Norris-LaGuardia Act and the First Amendment prior restraint doctrine—as well as the First Amendment independent examination requirement—are to be scrupulously applied so as to avoid judicial censorship of speech, rather than honored in the breach and ignored when most essential. Otherwise, as this case shows, the likely result is fatally compromising free speech during labor disputes, and free speech generally. For the NLA and the prior restraint doctrine are both intended to assure that federal judges do not, as the district court judges in this case and in *San Antonio Community Hospital* did, apply their personal sensibilities and find falsehood "when they see it," (*cf. Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)), rather than submitting the issue of truth or falsehood to reasoned legal analysis on a complete record and, where appropriate, to jury determination.

The Ninth Circuit has now approved just such cavalier judicial suppression of speech not once but twice, in rapid-fire succession.[7] In his dissent to the panel opinion in the *San Antonio Community Hospital* case, Judge Kozinski foresaw—even before the Ninth Circuit's second approval of judicial censorship in this case—that the approval of one speech-suppressing injunction would lead to a second and a third and to an inevitable downward spiral in the protection of labor speech, and of speech generally:

> This may not seem like a big deal. Who, after all, can object to forcing the union to change its banner so as to avoid even a small risk of deceiving the public? But ambiguity and flamboyance are often at the heart of political expression. Who, for example, can forget "Where's the Beef" from the 1984 Presidential campaign? But what is Senator Mondale had been forced to say: "Where's the substance?" No one would have noticed or remembered.
>
> So too with rats. Changing the sign may make it clearer, may avoid the smallest risk of confusion, but it saps the message of its vigor. . . . I don't believe courts are equipped—or even permitted to—evaluate such trade-offs. Because the sign here was literally true, within an accepted meaning of the word used, I would quash the injunction and let the parties work out their differences in the marketplace—and in the marketplace of ideas. . . .
>
> Since labor speech enjoys even greater protection than ordinary speech, today's opinion will provide plausible support to those who seek prior restraints against allegedly defamatory newspaper and magazine articles, as well as television programs, plays, and

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[7] The Sixth Circuit has also, it appears, lost sight of the firm NLA and First Amendment procedural protections against preliminary injunctions restraining labor speech. *See Mercy Health Services v. Local 1199 National Health and Human Service Employees Union*, 888 F. Supp. 828 (1995), stay of preliminary injunction denied, Sixth Circuit No. 95-1214 (Mar. 23, 1995).

> movies. Indeed, given the wafer-thin [legal] claim here, and the paltry evidence of irreparable harm, getting a preliminary injunction against speech offensive to public officials and other VIPs may not be all that hard. [App. 31a-32a.]

With Judge Kozinski, we submit that the time to stop this erosion of free speech rights is *now*, and that this Court should grant certiorari in this case and order the Ninth Circuit to vacate the injunction against free speech here.

**I. The Norris-LaGuardia Act and the First Amendment Prior Restraint Doctrine Preclude Preliminary Injunctions Against Peaceful But Allegedly False Labor Speech.**

Congress, in enacting the Norris-LaGuardia Act in 1932 and this Court, in the long series of prior restraint cases beginning with its *Near v. Minnesota* decision in 1931, have determined that federal courts must take the greatest care to avoid judicial injunctions against constitutionally protected speech, including, particularly, speech during labor disputes. The NLA and this Court's prior restraint cases spell out a set of procedural protections that guard against judicial censorship of peaceful, constitutionally protected speech activity. The Ninth Circuit in this case countenanced the violation of each of those legislative and judicial speech-protective procedural requirements.

**A. The Norris-LaGuardia Act**: The Norris-LaGuardia Act was enacted because of concern that the federal judiciary's use of its injunctive power was determining the outcome of labor disputes. *See generally* Frankfurter & Green, *The Labor Injunction* (1930). "The legislative history [of the NLA] is replete with criticisms of the ability of powerful employers to use federal judges as 'strike-breaking' agencies." *Jacksonville Bulk Terminals v. Longshoremen, supra,* 457 U.S. 702, 716 (1982). And, the Act's "language is broad because Congress was intent upon taking the federal courts out of the labor injunction business except in . . . very limited circumstances." *Bur-*

*lington No. R. Co., supra*, 481 U.S. at 441, *quoting Marine Cooks & Stewards v. Panama S.S. Co.*, 362 U.S. 365, 369 (1960).

In *San Antonio Community Hospital* and this case, the Ninth Circuit has sanctioned a return to the labor injunction era in the federal courts. Anheuser-Busch—turned down in an attempt to obtain an injunction from a state court—filed suit in federal court and, in ten days, obtained an injunction with no finite duration censoring the Union's free expression during its labor dispute with the Company. For three reasons, the injunction violated and continues to violate the NLA:

*First*, Section 7 of the Norris-LaGuardia Act, in the plainest language, requires a live hearing before a district court may issue *any* injunction in a labor dispute:

> No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute . . . except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) . . . and testimony in opposition thereto . . . [29 U.S.C. § 107].

The purpose of the live hearing requirement is to prevent "not the least of the evils that led to the Norris-LaGuardia Act, . . . the frequent practice of issuing labor injunctions upon the basis of affidavits rather than after oral proof presented in open court." *Eccles v. People's Bank of Lakewood Village, Cal.*, 333 U.S. 426, 434 (1948).

In this case, the district court flatly refused to hear any live witnesses. Without any live testimony regarding the visibility of the banner as a whole, the understanding by actual viewers of the banner as to whether there was a rodent infestation or a labor dispute at the brewery, *any* impact on the Company's sales or other injury, irreparable

or otherwise, to the Company, or any less speech-restrictive way to clear up any possible misunderstanding (such as posting of an explanatory banner by the Company), the district court issued a preliminary injunction. And, despite lengthy briefing on the question (Opening Brief of Appellant Local 209 at 47-51), the Ninth Circuit, in its summary opinion, did not deem this blatant statutory violation even worthy of mention.[8]

*Second*, before an injunction can issue, the NLA requires a finding, *inter alia*, "that unlawful acts . . . have been committed and will be continued unless restrained . . ." NLA § 7(a), 29 U.S.C. § 107(a). Here, the district court did not find that any of the Union's acts *were* unlawful, but only that "[p]laintiff has shown *probable success* on the merits of the claims for fraud and dilution," App. 10a (emphasis supplied). And the Ninth Circuit did not review even that tentative conclusion on the merits, but determined that the district court had not "abuse[d] its discretion" in so concluding. App. 4a.

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[8] This Court has never addressed the question whether there are any circumstances in which a live hearing need not be held before issuing an injunction affecting a labor dispute. For the most part, the courts of appeal have strictly applied the requirement, reversing injunctions covered by NLA § 7 when no live hearing was held. *See, e.g., Tejidos De Coamo, Inc. v. ILGWU*, 22 F.3d 8, 14-15 (1st Cir. 1994); *District 17, United Mine Workers of America v. A&M Trucking, Inc.*, 991 F.2d 108, 111 (4th Cir. 1993); *United Telegraph Workers v. Western Union*, 771 F.2d 699 (3rd Cir. 1985); *In re District No. 1-Pac. Coast Dist. Marine Eng'rs' Beneficial Ass'n*, 723 F.2d 70 (D.C. Cir. 1983); *International Union UAW v. LaSalle Machine Tool*, 696 F.2d 452, 457 (6th Cir. 1982). The Second, Fifth and Seventh Circuits, however, have held or suggested that in very limited circumstances failure to comply with the live hearing requirement may not be reversible error. *See, Local Lodge No. 1266 v. Panoramic Corp.*, 668 F.2d 276, 290-291 (7th Cir. 1981); *Drywall Tapers and Pointers v. Operative Plasterers' and Cement Masons' Int'l Ass'n*, 537 F.2d 669, 674 (2d Cir. 1976); *Fish v. Pepsico, Inc.*, 491 F.2d 556, 560 (2d Cir. 1974).

That failure to consider on their merits the extremely serious issues the Union raised concerning the legal viability of the Company's complaint on its merits was far from harmless. The briefest reflection is sufficient to demonstrate that the legal claims the district found to be probably meritorious are in fact entirely without merit.

The Company in fact *conceded* in the court of appeals that it could not sustain a cause of action for common law fraud. While the district court found otherwise, that court did not address in any way the constituent elements of the fraud claim. App. 10a. And although the Company maintained on appeal that there were other state law claims that could be established on the facts of this case, fraud is the only state claim alleged in the complaint, and neither the district court nor the court of appeals determined that any other state law claim had been made out.

As to the Lanham Act dilution claim, the 1996 amendment to the Lanham Act permitting injunctive relief for dilution applies *only* to "commercial use in commerce" of a trademark, and contains an express exception for "[n]on-commercial use of a mark." 15 U.S.C. § 1125(c). Because the Union was not selling, advertising, or transporting any goods or services but, instead, was criticizing the Company's contracting practices, the Union's identification of the Company's product by its tradename was not a "use in commerce" as that term is defined in the statute. 15 U.S.C. § 1127 (defining "use in commerce").[9]

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[9] The only opinion of which we are aware addressing on its merits the question whether the use of a trade name in a union communication to the public concerning the issues in a labor dispute simply to identify a product of the employer with whom there is a dispute is a "use in commerce" under 15 U.S.C. § 1127 has concluded that it is not. *WHS Entertainment Ventures v. United Paperworkers International Union*, 1998 WL 119606, *3 (M.D. Tenn. Mar. 11, 1998). *Cf. International Association of Machinists v. Winship Green Nursing Center*, 103 F.3d 196, 209 (1st Cir. 1996) (Saris, J., concurring).

Moreover, by providing that only "*commercial* use in commerce" is covered (29 U.S.C. § 1125(c) (emphasis supplied)) and including the "noncommercial use" proviso, Congress specifically intended to make clear that only "commercial speech" can be enjoined.[10] This Court has never held that peaceful speech publicizing a labor dispute is "commercial speech." Rather, the Court has stressed that "the [peaceful] dissemination of information concerning the facts of a labor dispute [is] . . . within that area of free discussion that is guaranteed by the Constitution." *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940), and that therefore federal statutes regulating expression are to be construed so as not to reach labor speech that does not involve picketing or patrolling, to avoid raising "serious constitutional issues." *DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575-76 (1988).

Since the 1996 Lanham Act amendments do not require any finding of fraud and permit injunctions without regard to the truth or falsity of the speech in question, the holding below that the Act applies to the Union's activity would suggest that *any* appeal to the public by a union (or any other protest group) disparaging a product described by its famous "mark or trade name" could come within the Lanham Act ban on dilution. To state that proposition is to refute it.

That the district court nonetheless issued the injunction on such flimsy legal grounds and was upheld by the court

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[10] The House Report on the 1996 Dilution Act provides that "§ (4)(B) of the bill expressly incorporates the concept of 'commercial' speech from the 'commercial speech' doctrine," concluding that "[n]othing in this section of the bill is intended to alter existing case law on the subject of what constitutes 'commercial' speech." H.R. Rep. No. 104-374 (Nov. 30, 1995). *See also* 141 Cong. Rec. S19310 (daily ed. Dec. 29, 1995) (remarks of Sen. Hatch) (the Dilution Act exempts "forms of expression that are not part of a commercial transaction,"). *See generally* J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 24:97, pp. 24-157 to 24-158 (1996).

of appeals in so doing demonstrates that issuing injunctions against speech in labor disputes prior to a complete, deliberate consideration of the factual and legal issues raised is, now as in 1932, likely to lead to curbs on speech that, on due and careful consideration, cannot be legally justified.

*Third*, NLA § 4 provides:

> No court of the United States shall have jurisdiction to issue any . . . temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons . . . from . . . (e) [g]iving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence. [29 U.S.C. § 104.]

And § 7(c), 29 U.S.C. § 107(c), requires that before any injunction can issue involving a labor dispute, there must be a finding that "greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief."

In upholding the injunction in this case (and in the *San Antonio Community Hospital* case), the Ninth Circuit applied the "fraud" exception exceedingly broadly, to encompass the use of an accepted and traditional, albeit metaphorical and highly critical, epithet. And the court of appeals upheld an injunction issued on hasty, preliminary consideration, and without giving *any weight at all* in balancing the equities to the fact that the injunction, while purporting to leave the Union free to communicate its message regarding its dispute with Budweiser, would "sap[] the message of its vigor," (App. 31a). *See* App. 8a (considering the Union's only injury to be the cost of producing a new banner).

The drafters of the NLA however, intended to *include* within the NLA's injunction prohibitions bans on "abusive . . . annoying . . . indecent . . . [and] 'bad' language—and against specific words such as 'scab', 'traitor', [and]

'unfair'." Frankfurter & Green, *supra*, at 98; *see also id.* at 115 n.132 (citing the term 'rat' as a usage improperly enjoined.) And, as the Eighth Circuit held long ago, the NLA's sweeping ban on enjoining speech during a labor dispute suggests a very narrow scope for the "fraud" exception:

> Expressions of opinion, though inaccurate and even misrepresentative in character, obviously cannot be permitted to be made the basis ordinarily for injunctive process in a labor dispute. . . . In effectuating the purpose of the Act . . . the exceptions which have been left open to injunctive process may not be treated lightly, or as if the Act had never been passed, but should be viewed restrainedly, as a narrow field of permissive jurisdiction, exercisable in the interest of a public policy co-ordinate with that aspect upon which the prohibitions of the statute rest. [*Ironworkers v. Pauly Jail Bldg. Co.*, 118 F.2d 615, 616-17 (8th Cir. 1941), *cert. denied*, 314 U.S. 639 (1941).]

*See also Wilson & Co. v. Birl*, 105 F.2d 948, 952 (3rd Cir. 1939) ("Carrying signs stating that Wilson & Co. was unfair to organized labor may have been misrepresentative. It was not fraudulent."); *Marriott Corp. v. Great America Service Trades Council*, 552 F.2d 176, 180 (7th Cir. 1977) (recognizing that the NLA does not permit a preliminary injunction banning an advertisement, precipitated by a labor dispute even though the advertisement may "contain[] deceptive representation and inference" and is alleged to violate the Lanham Act.)

Given the broadly speech-protective edict of NLA § 4(e), interpreting that section to withdraw jurisdiction from the federal courts to issue speech-curbing injunctions unless there is a final decision *on the merits*—not preliminarily, on a probability of success basis—that there *was* fraud is the interpretation that best gives full expanse to the Congress' intention "to tak[e] the federal courts out of the labor injunction business except in . . . very limited cir-

circumstances." *Burlington No. R. Co., supra,* 481 U.S. at 441. And that rule is, in any event, dictated by this Court's First Amendment prior restraint cases, as we now show.

**B. First Amendment Prior Restraint Doctrine:** "Prior restraints on speech . . . are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart, supra,* 427 U.S. at 559; *see also Organization for a Better Austin v. Keefe,* 402 U.S. 415, 419 (1971) ("[a]ny prior restraint on expression comes to this court with a 'heavy presumption' against its constitutional validity."). "A prior restraint . . . has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time." *Nebraska Press Ass'n,* 427 U.S. at 559. And, "[t]emporary restraining orders and permanent injunctions—i.e., court orders that actually forbid speech activities—are classic examples of prior restraints." *Alexander v. U.S.,* 509 U.S. 544, 550 (1993).

The Ninth Circuit was of the view that the stringent prohibition upon prior judicial restraints of speech is inapplicable here, because "[t]he First Amendment does not protect fraud." *San Antonio Community Hospital,* App. 28a. But regardless of the label put on the speech here—false, fraudulent, injurious—the basis for the claim against it is that the speech is allegedly false.

This Court's cases make clear that although false speech is not protected as such by the First Amendment (*Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 340 (1974)), the prior restraint doctrine nonetheless applies in two respects to speech that is *alleged* to be false, as it does to other allegedly unprotected speech.[11]

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[11] Labor dispute speech, like speech about public figures, is "false" for First Amendment purposes only if it is knowingly false or spoken with reckless disregard of the truth. *Letter Carriers v.*

First, there can be no injunctions against expression that has not yet taken place, whether that speech is alleged to be false or not. *Organization for a Better Austin v. Keefe, supra,* 402 U.S. at 418 (in the injunctive setting "the courts do not concern themselves with the truth or validity of the publication"); *Near v. Minnesota, supra,* 283 U.S. at 714 ("The preliminary freedom extends as much to the false as to the true.") For, "if there be time to expose through discussion the falsehood and fallacies, to avert the evil by processes of education, the remedy is more speech, not enforced silence. Only an emergency can justify repression." *Linmark Associates, Inc. v. Willingboro,* 431 U.S. 85, 97 (1977), *quoting Whitney v. California,* 274 U.S. 357, 377 (1927) (Brandeis, J. concurring).

The injunction in this case reaches not only the particular banner already displayed but *any* "advertisement or sign exhibited to the public, disparaging the purity of Plaintiff's product [and using the Budweiser trademark], and *expressly or impliedly representing by word, sign or action,* the false notion that the Van Nuys facility has a roden or *any other loathsome problem.*" App. 10a, emphasis supplied. So worded, the injunction censors in advance the publication of entirely new, heretofore unpublished signs or advertisement, reaching statements that have nothing to do with "rats"—of either the rodent or the labor relations epithet variety—and as to which the courts can only "speculate as to the effect of publication." *Pittsburgh Press v. Pittsburgh Commission on Human Relations,* 413 U.S. 376, 390 (1973); *see also Southeastern Promotions, Ltd. v. Conrad,* 357 U.S. 513, 558-59 (1975) ("It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable.") Under the

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*Austin, supra*; *Linn v. Plant Guard Workers, supra,* 383 U.S. at 58; *cf. New York Times v. Sullivan,* 376 U.S. 254 (1964).

branch of the prior restraint doctrine forbidding injunctions in advance of publication, then, the injunction in this case cannot stand.

Second, "another recurring theme in [this Court's] prior restraint cases" concerns "the requisite procedural safeguards" to avoid enjoining protected speech. *Alexander v. United States, supra*, 509 U.S. at 55. "The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment." *Pittsburgh Press*, 413 U.S. at 390. For that reason, that "mere probable cause to believe that a legal violation has transpired is not adequate to remove [expression] from circulation," *Fort Wayne Books, Inc. v. Indiana, supra*, 489 U.S. at 66, and, in particular, an injunction "based on a showing of probable success on the merits, . . . without a final determination" that the speech is in fact outside the First Amendment's protections cannot stand. *Vance v. Universal Amusement Co., Inc., supra*, 445 U.S. at 313.[12]

The procedural haste in this case resulted in exactly the evil the two strains of the prior restraint doctrine are designed to avoid: Because there was no evidentiary hearing, let alone a trial on the merits, and the speech was so precipitously enjoined, there was no way to determine whether, as the courts below assumed, passersby actually understood the Union's banner as asserting that there were rodents in the brewery; believed that assertion be-

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[12] Because the injunction in this case issued on a probable success basis, with no evidentiary hearing whatever let alone a plenary trial, and swept much broader than the banner the Union had already displayed, the question whether the First Amendment prior restraint doctrine permits an injunction against *particular* noncommercial speech on the ground of its proven falsity even *after* its initial publication and a trial on the merits is not presented. It bears noting, however, that this Court has never, so far as we are aware, approved such an injunction. *Cf. Kramer v. Thompson*, 947 F.2d 666 (3d Cir. 1991).

cause they saw it on a single sign in front of a brewery during a labor dispute; and therefore stopped buying Budweiser beer. Each of those suppositions is both highly unlikely and susceptible of proof at trial if true. And, even if those factual premises *were* ultimately proven, the speech enjoined is in any event almost assuredly *not* within the injunctive authority of the federal courts under the Lanham Act 1996 dillution amendments, or enjoinable as a common law fraud. *See* pp. 17-19, *supra*.

In short, this Court should grant certiorari because, as this case shows, the dangers of judicial interference in the determination of labor disputes and of judicial censorship through injunction are still very much alive and will remain so unless scrupulously avoided through the procedural protections imposed by Congress in the NLA, and by this Court in its prior restraint cases.

**II. This Court Should Grant Certiorari and Exercise Its Independent Judicial Judgment to Conclude that the Union's Banner Is Fully Protected by the First Amendment.**

Quite aside from the prior restraint doctrine, this Court has imposed a second procedural hurdle to judicial interference with freedom of speech: "Whenever it is claimed" —as in this case—"that a particular communication is unprotected" by the First Amendment, "the limits of the unprotected category, as well as the unprotected character of particular communications, have been determined by the judicial evaluation of special facts that have been deemed to have constitutional significance." *Bose Corp. v. Consumers Union of U.S., Inc., supra*, 466 U.S. at 505. This rule is one of "federal constitutional law," (*id.* at 510), and requires appellate courts, including this Court, to "conduct[] an independent review of the record . . . to be sure that the speech in question actually falls within the unprotected category . . ." (*id.* at 505). For,

> Providing triers of fact with a general description of the type of communication whose content is unworthy

> of protection has not, in and of itself, served sufficiently to narrow the category, nor served to eliminate the danger that decisions by triers of fact may inhibit the expression of protected ideas. [*Id.*]

In this case, the Ninth Circuit conducted no such independent review, but rather reviewed the record only for "abuse of discretion." Since the record consists only of the communication itself, the Ninth Circuit in fact deferred to the district court's conclusion that the communication, on its face, was unprotected under the First Amendment, rather than deciding that question for itself. The Ninth Circuit's deference to the district court on the question of First Amendment protection was improper, and the resulting conclusion—that the banner is on its face unprotected by the First Amendment—incorrect.

Over fifty years ago, this Court recognized that speech during a labor dispute is, as a general matter, entitled to the same solicitude as other speech on matters of "public concern":

> [S]atisfactory hours and wages and working conditions in industry and a bargaining position which makes these possible have [] importance. . . . The health of the present generation and of those as yet unborn my depend on these matters, and the practices in a single factory may have an economic repercussion upon a whole region and effect widespread systems of marketing. * * * Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society. [*Thornhill v. Alabama, supra,* 310 U.S. at 104-105.]

And such speech is entitled, in particular, to the special judicial review, accorded other speech concerning public affairs, "of the facts to insure that the speech involved is not protected under federal law." *Letter Carriers v. Austin, supra,* 418 U.S. at 282.

In conducting such review, courts protect the right of speakers in labor disputes "to use intemperate, abusive, or insulting language without fear of restraint or penalty if it believes such rhetoric to be an effective means of making its point." *Id.* at 283. For, "to use loose language or undefined slogans that are part of the conventional give-and-take in our economic and political controversies—like 'unfair' or "fascist' [or 'rats']—is not to falsify facts," (*Cafeteria Employees Local 302 v. Angelos*, 320 U.S. 293, 295 (1943)), and cannot, without more, be proscribed. In short, in labor disputes as in other debates and protests, "[e]xpression of . . . an opinion, even in the most perporative terms, is protected. . . ." *Letter Carriers v. Austin*, 418 U.S. at 284.

Applying these principles in *Austin*, the Court, reviewing the record, concluded that Jack London's definition of a "scab" is protected labor speech, albeit based upon "rhetorical hyperbole, a lusty and imaginative expression of . . . contempt." 418 U.S. at 286. Since "[o]ne of the generally accepted definitions of 'scab' is one who refuses to join a union," . . . calling workers who refuse to join a union scabs,'." cannot be unprotected speech, since it is "literally and factually true," albeit "an insult or epithet." *Id.* at 283.

So here: The union's message relies heavily on "rhetorical hyperbole," and uses another well-established "lusty and imagination expression of the contempt felt by union members"—the term "rat." As a glance at the photograph of the banner submitted to the district court (App. 1a) indicates, the banner's double meaning use of this metaphorical language was understandable by the reader of the banner as a whole.

The banner's shorthand message was that contractors who pay less than prevailing wages and benefits, and companies that employ them, are bad for the economy and

for the community.[13] The sensible reader of the banner, whether or not he or she understood fully this message, would at least conclude that the critical term, "rats," was being used in a play-on-words, and was *not* being used in the sense one might think by glancing at the first line alone. For, no one reading the words "LOCAL #209 LABOR DISPUTE WITH RAT CONTRACTOR H.M.S.," would believe that the Union had a labor problem because the Company was contracting with rodents.

At worst, then, the reader is likely to conclude—even if he or she is unfamiliar with the precise labor-relations meaning of the term "rat"—that the word is being used in its general anthropomorphic meaning, expressing the opinion that a particular person is untrustworthy, not as a reference to small, unpleasant four-legged animals, and that the Union was therefore suggesting—as indeed the Union was—that the Company had taken action detrimental to the community's interests.

The Union, in communicating its message, did of course play on the well-worn pejorative meanings of the term "rat." But that dual use of the term made the Union's labor dispute message more effective, and is itself as protected as any other imaginative use of language.

In short, as in *Austin*, the Union's message was "literally and factually true," albeit perjorative, metaphorical, and

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[13] The idea that higher wages, as opposed to lower ones, stimulate the economy by providing greater disposable income while contractors who do not pay prevailing benefits may increase hospital and other insurance costs for others is certainly not novel. *See, e.g.*, Consol, *Stock Answers and the Minimum Wage*, The San Francisco Business Times, Friday, July 19, 1996; Miller & Collins, *Growing Economic Fairness*, 26 Social Policy 41 (June 1, 1996); Cola, *Senate Office of Research, Internal Government Review Agencies*, 15-SUM Cal. Reg. L. Rep. 28 (1995) (discussing declining insurance coverage, rising insurance costs, and increasing cost shifting); Jerry, *Health Insurance Coverage for High-Cost Health Care: Reflections on the Rainmaker*, 26 U. Mem. L. Rev. 1347, 1354 (1996) (discussing cost-shifting).

hyperbolic, and therefore protected by the First Amendment. The district court and Ninth Circuit's various substantive and procedural defaults resulted in judicial censorship of constitutionally protected labor speech for an extended period of time, with a possibly determinative impact upon the outcome of the labor dispute that cannot be precisely calculated nor retroactively corrected. The imposition of the injunction in the early stages of the labor dispute therefore had precisely the distorting impact the statutory and constitutional procedural protections accorded speech during a labor dispute are intended to prevent.

This Court should grant certiorari to restore the role of independent record review, as well as the prohibitions upon prior and preliminary injunctive restraints, in assuring against such infringements of freedom of speech during labor disputes.

## CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be granted and the judgment below should be reversed.

Respectfully submitted,

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